engagement through touts are looked down upon by the society. (Emphasis is added).

The Legal Profession (Practice and Etiquette) Rules 1978 were made by the Bar Council pursuant to s 77 of the Legal Profession Act 1976 which states as follows:

77 Power to make rules regulating practice etc

(1) Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.

(2) Any rules made pursuant to this section shall not come into operation until they have been published in the Gazette.

(3) Any advocate and solicitor who fails to comply with any rules made under this section may be liable to disciplinary proceedings.

(4) The Attorney General may, by order published in the Gazette make such modifications as he deems necessary to any rules made and published under this section before the coming into operation of this subsection.

In my view, before the court can regard touting as opposed to public policy under s 24(e) of the Contracts Act 1950 there must be shown to the court that touting has a tendency to be injurious to the public welfare. The Legal Profession (Practice and Etiquette) Rules 1978 were made by the Bar Council 'for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.' They do not apply to other people. The rules were not made by Parliament. They therefore cannot be taken to reflect public opinion. Has public opinion been expressed in this matter? I have not been informed of and I have not come across any expression of opinion from the public either for or against touting. The society has not shown its abhorrence to touting. If the prohibitions in rr 51 and 52 are statutory provisions I will have no hesitation to hold that touting is injurious to the public welfare because 'laws are reflections of the public opinion.' (*In the matter of Phool Din & Ors.*[2])

The case of *Re A Solicitor*[1] was a disciplinary proceeding. It is not directly relevant to the present case. In any event it is an old case.

The law relating to public policy must change with the passage of time, it cannot remain immutable: *Nagle* v *Feilden.*[3]

Further, what is injurious to public welfare in England may not necessarily be so in Malaysia and vice versa. What is and what is not injurious to public welfare in Malaysia must be decided in the Malaysian context.

In the present case on the affidavit evidence alone I cannot decide whether or not touting is injurious to public welfare. The court should not in my view just impose its own opinion on the matter. The court should be sensitive to the feelings of the general public. Before making its decision the court should be made aware of such feelings.

For the above reasons I dismissed the application with costs.

Application dismissed.

Solicitors: *Gan Teik Chee & Co; Shainuddin & Ranjit.*

Reported by *Yap Shao Sin*

D & C Finance Bhd v Overseas Assurance Corpn Ltd

HIGH COURT (KUALA LUMPUR) - SUIT NO D4-23-1340-88
ZAKARIA YATIM J
31 MAY 1989

Arbitration - Condition in policy providing for differences between parties to be referred to arbitration - Stay of proceedings - Whether differences had arisen between parties - Arbitration Act 1952, s 6

Insurance - Condition in policy provides that differences to be referred to arbitration - Stay of proceedings - Whether differences had arisen between parties

The plaintiff entered into a equipment leasing agreement with the lessee company, and the defendant agreed to indemnify the plaintiff and the lessee against loss and damage to the equipment. During the currency of the policy, the equipment was totally destroyed by fire and the plaintiff submitted their claim. By a letter, the defendant repudiated liability and the plaintiff commenced this action. The defendant then applied for a stay of all proceedings pursuant to s 6 of the Arbitration Act 1952, alleging that the matters in dispute were the quantum of damages and it was within the scope of the policy to refer all differences arising thereunder to arbitration.

Held, granting an order for stay of proceedings:

(1) The court has to be satisfied that the requirements of s 6 of the Arbitration Act are met when considering whether to grant or refuse the application. In this case, the court has to consider whether any differences had arisen between the parties, and from reading the letters between the solicitors for the parties, there were differences on quantum which should be referred to arbitration.

(2) The onus is on the party opposing the application for stay of proceedings to give sufficient reasons why the differences should not be referred to arbitration.

(3) Section 6 of the Arbitration Act provides for an application for stay after legal proceedings have commenced.

Cases referred to

1 *Lau You Timber Co* v *United General Insurance Co Ltd* [1968] 1 MLJ 181 (refd)
2 *Supreme QBE Insurance Bhd* v *Foo Yin Toh* [1987] 2 MLJ 466 (distd)
3 *Lee Kee Seng* v *Mohamed Halim Ismail* (Kuala Lumpur High Court Civil Suit No C655 of 1984) (unreported) (refd)
4 *London & North Western Railway* v *Billington Ltd* [1899] AC 79 (refd)

5 *London & North Western Railway* v *Jones* [1915] 2 KB 35 (refd)
6 *Heyman & Anor* v *Darwins Ltd* [1942] AC 356 (folld)

Legislation referred to
Arbitration Act 1952 s 6

Yusuf Khan for the plaintiff.
Khoo Eng Chin for the defendant.

Cur Adv Vult

Zakaria Yatim J: This was an application by the defendant for an order of the court that all proceedings in this action be stayed pursuant to s 6 of the Arbitration Act 1952. In the application the defendant stated that the plaintiff and the defendant having by an agreement in writing, namely, policy no CMO/AR/0496 dated 5 March 1985 agreed to refer to arbitration the matters in respect of which this action was brought.

In the amended statement of claim the plaintiff averred that it was the lessor of five units of 'Matuya', two units of 'Shima Seiki' fully automatic seamless glove knitting machines and two units of 'Shima Seiki' auto sewing glove knitting machines pursuant to an equipment lease agreement dated 13 April 1984 entered into between the plaintiff and one Fei Dar Industries (M) Sdn Bhd (hereinafter referred to as 'the lessee'). By a policy of insurance no CMO/AR/0496/NEW) dated 5 March 1985 issued by the defendant to the lessee and the plaintiff as the insured for their respective rights and interests, the defendant, in consideration of the premium paid to it, agreed to indemnify the lessee and the plaintiff against loss and damage occasioned by fire, theft and accident to the said equipment up to a maximum of $187,000 during the period 16 February 1985 to 15 February 1986. According to the plaintiff on or about 22 February 1985 during the currency of the said policy of insurance, the said equipment was totally destroyed by fire and rendered useless and consequently the plaintiff had suffered loss and damage. The plaintiff then submitted their claim under the said policy in a letter dated 9 July 1985 to the defendant. The defendant in its letter dated 6 December 1986 repudiated liability and the plaintiff alleged that the defendant had failed, neglected and/or refused to pay the sum of $187,000 less $750,000 as specified in the excess clause.

The defendant in its affidavit in support of the application referred to cond 6 of the said policy and averred that the matters in dispute in this action were the quantum of damages to be paid under the said policy. According to the defendant there was no dispute by the defendant on its liability under the said policy in so far as the plaintiff was concerned. The defendant also stated in the affidavit that the matters in dispute in this action were within the scope of the said policy to refer all differences arising thereunder to arbitration. The defendant also stated that the writ of summons had been served on the defendant and the defendant had caused an appearance to be entered on its behalf to the action but had taken no further step in the action. The defendant further stated that at the time the action was commenced, the defendant was, and remained, ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration in accordance with the provisions of the said policy. The defendant stated that it had a good defence to the said action on quantum and the application was not made for the purpose of delay.

The plaintiff in its affidavit in reply stated, inter alia:

(i) the defendants were not at the commencement of the proceedings, ie on 6 June 1988 ready and willing to do everything necessary for the proper conduct of the arbitration;
(ii) instead the defendant had by their letter of 6 December 1986 denied liability under the policy of insurance;
(iii) the defendant's refusal to pay the plaintiff's claim under the policy of insurance which they did not dispute, did not give rise to a 'difference' calling the arbitration clause in the policy into operation;
(iv) The Supreme Court had upheld the High Court Seremban's decision in Civil Appeal 12-3-86, a case which ruled that the insurers were to pay the amount insured in full unless the policy specifically provided for a method of calculation of their indemnity otherwise;
(v) the issues in this action involved interpretation of the clauses in the said insurance policy and in the circumstances the appropriate forum would be this court.

Mr Khoo Eng Chin, counsel for the defendant, in his submission referred to s 6 of the Arbitration Act 1952 and to cond 6 of the said policy and submitted that there were differences between the parties on quantum. Encik Yusof Khan, counsel for the plaintiff opposed the application for stay and submitted that the amount or the quantum was not in dispute between the parties.

In considering whether to grant or refuse the application the court had to be satisfied with the requirements of s 6 of the Arbitration Act, namely:

(1) there was an agreement between the parties and the agreement contained an arbitration clause;
(2) that the applicant had not taken any other steps in the proceedings;
(3) there must be sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
(4) that the applicant was at the time when the proceedings were commenced still ready and willing to do all things necessary to the proper conduct of the arbitration.

In this case the agreement was entered into between the plaintiff and the defendant on 5 March 1985. The arbitration clause was stated in cond 6 of the agreement. Condition 6 states as follows:

> If any difference shall arise between the corporation and the insured or any claimant under this policy such difference shall be referred to a single arbitrator and the costs of the reference and award shall be in the discretion of the arbitrator. The making of an award in such reference shall be a condition precedent to any liability of the corporation or any right of action against the corporation in respect of any such difference. If the corporation shall disclaim liability to the insured for any claim hereunder and such claim shall not within 12 calendar months from the date of such disclaimer have been referred to arbitration under the provision herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

The question for the court to consider was whether pursuant to cond 6 any difference had arisen between the parties. In its affidavit in reply the defendant exhibited two letters. The first letter was written by the solicitors of the defendant on 9 February 1988 addressed to solicitors for the plaintiff. In the letter it was stated:

> Dear Sirs
>
> Re: Equipment All Risks Policy No CMO/AR/0496
> Insured: Fei Dar Industries (M) Sdn Bhd
>
> We are instructed by the Overseas Assurance Corporation Limited of Kuala Lumpur to acknowledge receipt of your letter of 29 January 1988 and to say as follows.
>
> To enable us to consider and advise our clients on your client's claim, could you let us have the following further and better particulars:
>
> 1 What was the balance of the principal amount payable under the lease agreement as at 21 February 1985.
> 2 What was the stipulated loss value of the equipments as at 21 February 1985.
> 3 What was the amount of the security deposit retained by your clients under the lease agreement.
> 4 What was the pre-paid rental made to your clients under the lease agreement.
>
> We will refer the matter to our clients for further instructions upon receipt of the aforesaid particulars from you.
>
> Yours faithfully,
> Sgd

In reply to that letter, the plaintiff's solicitors wrote:

> 3 March 1988
>
> Messrs Khoo & Sidhu
> Advocates & Solicitors
> 1st Floor
> 16, Jalan Silang
> 50050 Kuala Lumpur
>
> Dear Sirs
>
> Re: Equipment All Risks Policy No: CMO/AR/0496
> Insured: Fei Dar Industries (M) Sdn Bhd
>
> We refer to your letter dated 9 February 1988 and are to state that since our clients are claiming for the full sum assured, the particulars required by you are not relevant.
>
> Yours faithfully,
> Sgd

Upon reading these two letters, I was of the opinion that there were differences between the parties on quantum and these differences should be referred to arbitration under cond 6.

In the instant case the defendant, apart from entering appearance, had not taken any other steps in the proceedings. In para 8 of the defendants' affidavit affirmed on 16 June 1988, the defendant averred that 'the defendant was, and remains, ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration...'. The plaintiff in its affidavit in reply merely denied the defendant's averment but gave no reasons or evidence to show that the defendant was not ready and willing to refer the dispute to arbitration.

The onus was on the plaintiff, which was opposing the stay, to give sufficient reasons why the differences should not be referred to arbitration. See *Lau You Timber Co* v *United General Insurance Co Ltd.*[1] Encik Yusuf Khan in his submission referred to *Supreme QBE Insurance Bhd* v *Foo Yin Toh.*[2] In my view that case does not apply to the present case because that case was decided after a trial, and the question of referring any difference to arbitration was no longer in question. Learned counsel also referred to the case, *Lee Kee Seng* v *Mohamed Halim Ismail*, Kuala Lumpur High Court Civil Suit No C655 of 1984 (unreported). In that case the learned judge, following the decision of the House of Lords, in *London & North Western Railway* v *Billington Ltd*,[4] held that the defendant did not take any steps to have the matter referred to arbitration *before the action was instituted* by the plaintiff and that the defendant was not therefore entitled to have the action stayed under s 6 of the Arbitration Act.

It will be noted that in *London & North Western Railway* v *Billington*,[4] the decision of the House of Lords was centered on the construction of a statutory provision, namely, s 5 of the London & North Western Railway Co (Rates & Charges) Order Confirmation Act 1891 (54 & 55 Vict C ccxxi). The section states:

> The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provided that where before any service is rendered to as trade he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience.

Earl of Halsbury LC in his speech in the *London & North Western Railway* v *Billington*,[4] said:

... that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raised then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable. If, in the ordinary course of things, some question had arisen between the parties which they wanted to arbitrate upon, and a submission to arbitration were agreed upon in this form - which very commonly is the form - 'that all matters in difference shall be submitted to AB', it would be a condition precedent to the arbitrator entering upon any form of inquiry there that the person who insisted that there was a difference should shew that the difference had arisen before the submission to arbitration was made. That is a matter which has been repeatedly decided, and I should think that no lawyer would hesitate to say that that is the true condition of the law.

The decision in *Lee Kee Seng's* case[3] also contained a passage taken from the judgment of Rowlatt J in *London & North Western Railway* v *Jones*[5] at p 38. That case was also concerned with s 5 of the English Act quoted above. Rowlatt J said:

... if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and *the courts have no jurisdiction to determine that difference* ... (Emphasis added).

In my opinion, the situation in *Lee Kee Seng's* case[3] was different from that in the present case. Having examined the authorities relied upon in that case, I did not think that *Lee Kee Sengs's* case[3] applied in the present case.

In the present case cond 6 must be read in relation to s 6 of the Arbitration Act. Section 6 clearly provides that an application for stay is made after legal proceedings have commenced. In *Heyman and Anor* v *Darwins Limited*,[6] the parties had included an arbitration clause in the contract. The arbitration clause stated, 'if any dispute shall arise between the parties ... in respect of this agreement ... the same shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1889.' A dispute arose between the parties and the appellants commenced an action against the respondents claiming a declaration that the respondents had repudiated the contract. The respondents denied that they had repudiated the contract and applied to have the action stayed in order that it might be dealt with under the arbitration clause. The House of Lords held that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed.

I respectfully agree with the decision of the House of Lords in *Heyman's* case.[6]

For the reasons stated above I allowed the defendant's application for stay of all proceedings in this action to enable parties to refer their differences to arbitration with costs.

Application allowed.

Solicitors: *Khoo & Sidhu*; *Yusuf Lee Pathma & Marbeck.*

Reported by *Yap Shao Sin*

Securicor Malaysia Sdn Bhd v Mohd Lazi bin Katan

HIGH COURT (JOHORE BAHRU) - CIVIL APPEAL NO 16-4A OF 1987
ABU MANSOR J
27 APRIL 1989

Labour Law - Dismissal of employee - Complaint made by employee to labour officer - Claim for sums including arrears of wages - Labour officer making order for payment of arrears of wages in purported compliance with Industrial Court Award - Whether labour officer had acted within jurisdiction - Employment Act 1955, ss 14 & 69 - Industrial Relations Act 1967, ss 20, 26, 33 & 56

The respondent, a security officer employed by the appellant, was dismissed from his employment for serious misconduct. The respondent then lodged a complaint to the Labour Office under s 69(1) of the Employment Act 1955, claiming: (i) the sum of $390 as salary in lieu of notice of termination; (ii) the sum of $389.99 as termination benefit; and (iii) the sum of $800 as arrears of salary for the year 1984-1985. A labour officer conducted an enquiry into the complaint and then made an order that the appellant pay the respondent the sum of $485 in purported compliance with Industrial Court Award No 50 of 1986. The appellant appealed against the order to the High Court. The first ground of appeal was that, as the complaint of the respondent arose out of his dismissal for misconduct and not out of a claim for wages, the labour officer in holding the enquiry had usurped the functions of the Director General for Industrial Relations and of the Industrial Court. It was contended therefore that the respondent had acted without jurisdiction as ss 20 and 26 of the Industrial Relations Act 1967 had made specific provisions regarding the hearing of complaints in all cases of dismissal. The second ground of appeal was that the labour officer had no jurisdiction to make the order as his doing so was in disregard of ss 33 and 56 of the Industrial Relations Act 1967 which provided the Industrial Court with jurisdiction to interpret and enforce its awards.

Held, allowing the appeal:

(1) The labour officer had no jurisdiction to decide on items (i) and (ii) of the claim but in fact he decided on the item (iii) of the claim after dismissing items (i) and (ii). To say that he decided on the validity of the dismissal of the respondent was not correct. In fact he decided on a claim for wages. The first ground of appeal therefore failed.

(2) The labour officer in hearing the complaint and deciding that the appellant was liable to pay the sum of $485 to the respondent under Award No 50 of 1986 was usurping the